In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-85

BALDWIN COUNTY ELECTRIC MEMBERSHIP CORPORATION, ET AL., PETITIONERS

v.

PRICE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners contend that the Price Commission incorrectly refused to apply its regulation retroactively to invalidate an electric utility rate increase order issued prior to the promulgation of the regulation.

On November 1, 1971, the Alabama Power Company sought authority from the Federal Power Commission to increase rates for the sale of wholesale electric power to rural electric distribution systems. Eleven electric cooperatives (the "Baldwin group") filed an opposition to the proposed increase with the Commission, and subsequently twelve municipalities (the "Luverne group") joined this opposition.

On December 30, 1971, the Commission issued a final order under which the proposed rates became effective, on an interim basis, on February 2, 1972, after a one-

month suspension period.[1] On January 13, 1972, the Baldwin group sought reconsideration of that order. The Luverne group filed a similar petition.

On January 14, 1972, the Price Commission published new regulations controlling rate increases by public utilities, to become effective January 17, 1972 (37 Fed. Reg. 652). The regulations provided, *inter alia*, that (*id.* at 653):

> * * * no price * * * may be increased before the end of the maximum suspension period permitted by law unless the regulatory agency has certified to the Price Commission that there is good cause for earlier effective date, together with its reasons therefor, and the Price Commission has approved that certification.[2]

The "maximum suspension period permitted by law" for the Alabama Power Company application before the Federal Power Commission was five months.

The Baldwin group brought the change in the regulations to the attention of the Federal Power Commission on January 21, 1972, in a supplemental application for rehearing. On February 2, 1972, the proposed rate became effective on an interim basis; on February 11, 1972, the Federal Power Commission denied the petitions for reconsideration, noting that the January 14 Price Commission regulation did not require a further suspension of the proposed rate increase, since the final order of December 30, 1971, conformed with the Price

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[1] The order also set the substantive issues with respect to the proposed permanent rate increase for an evidentiary hearing.

[2] 6 C.F.R. 300.16(i)(3). This regulation was repealed two months later. Public utility rate increases are currently exempt from controls under the Economic Stabilization Program. 38 Fed. Reg. 21602

Commission regulations in effect at that time (Pet. App. 5a).

The Alabama Power Company made prompt reports to the Price Commission, as required by regulation (36 Fed. Reg. 23977), of its application to the Federal Power Commission for a rate increase, and of the Commission orders of December 30, 1971 and February 11, 1972. These matters were also reported to the Price Commission by petitioners.

On March 24, 1972, the Price Commission approved the Alabama Power Company request for the interim rate increase (Pet. App. 1a). Without requesting Commission reconsideration (see 37 Fed. Reg. 1245), petitioners sought immediate review of the Price Commission order in the district court.

The district court granted the respondents' motion for summary judgment (Pet. App. 2a), and the Temporary Emergency Court of Appeals affirmed, Judge Hastie dissenting (Pet. App. 3a). While the case was in the courts, the Price Commission was dissolved, and its functions were assumed by the Cost of Living Council (Executive Order 11695, 38 Fed. Reg. 1477, January 12, 1973).

1. This case involves the application to a unique factual situation of a regulation which is no longer in effect.[3] The decision below has no prospective importance warranting review by this Court.

2. The narrow issue in this case is whether the Price Commission regulation of January 14, 1972, applied to a rate increase authorized by a Federal Power

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[3] Petitioners point to no other case involving the challenged regulation, and we are aware of none.

Commission order which became final before the regulation was issued, when the increase took effect after the effective date of the regulation. The Price Commission held that the regulation did not apply (Pet. App. 5a-6a, and n. 3). This interpretation served two basic regulatory goals: it minimized administrative conflicts in a highly regulated sector of the economy, and enhanced the predictability and certainty of regulatory actions by avoiding retroactivity.

The Price Commission consistently has minimized regulatory conflicts by relying upon the expertise of the federal regulatory agencies in establishing reasonable public utility rates, and by imposing additional restraints only when necessary to enforce substantive Economic Stabilization Program goals.[4] The approval of the Alabama Power Company rate increase reflected this reliance. Having satisfied itself that the Federal Power Commission order of December 30, 1971 fairly and correctly applied the regulation in effect at the relevant time and that its enforcement was not inconsistent with the goals of the Economic Stabilization Program, the Price Commission permitted the interim rate increase.

Petitioners contend that this course of action was inconsistent with the Price Commission's regulation of

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[4] The first Price Commission regulations pertaining to public utility rates permitted increases which had been approved by a regulatory agency (36 Fed. Reg. 21792). This regulation was amended on December 16, 1971, by the addition of the following sentence (36 Fed. Reg. 23977):

> In order to insure that the goals of the economic stabilization program are attained, the Price Commission reserves the right to review and limit the amount of any such requested increase, or other authorized increase.

January 14, 1972. But that regulation did not require the suspension of orders which were issued before its promulgation.[5] Therefore, the Commission correctly refused to apply the regulation retroactively. See *Greene* v. *United States*, 376 U.S. 149, 160; *Arizona Grocery Co.* v. *Atchison Ry.*, 284 U.S. 370, 389-390; Griswold, *A Summary of the Regulations Problem*, 54 Harv. L. Rev. 398, 411-415 (1941).

3. Finally, petitioners have failed to demonstrate that the Price Commission's interpretation of its own regulation was erroneous. Therefore, the court below correctly adopted that interpretation. In *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414, this Court stated that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." See also *Udall* v. *Tallman*, 380 U.S. 1, 16.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

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[5] The Federal Power Commission's order was final, even though a petition for rehearing was pending when the Price Commission regulation was promulgated. See 16 U.S.C. 825*l*(c); 18 C.F.R. 1.34(a).